

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Shelly Elisabeth Avon operating as Avonlea Home Cleaning
("Avonlea")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1999/146

DATE OF HEARING: May 25, 1999

DATE OF DECISION: May 31, 1999

DECISION

APPEARANCES

For Avonlea Home Cleaning	Shelly Avon
For the Director of Employment Standards	Karyn Luttmer
Rebecca Rheault	On her own behalf

OVERVIEW

This is an appeal by Shelly Elisabeth Avon operating as Avonlea Home Cleaning ("Avonlea"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued February 16, 1999. The Director found that Avonlea contravened Sections 16, 18, 34, 40, 44, 46, 58 and 63 of the Act in failing to pay Rebecca Rheault ("Rheault") overtime wages, annual vacation pay, regular pay for regular hours worked, minimum daily pay, statutory holiday pay, and compensation in lieu of notice, and Ordered Avonlea to pay \$1,252.89 to the Director on behalf of Rheault.

ISSUE TO BE DECIDED

At the hearing, Ms. Avon withdrew the appeal in respect of overtime wages. While she did not dispute the actual calculations owing for gas and mileage, she was of the opinion that vacation pay ought not be calculated on that amount. The Director's delegate agreed that 4% vacation pay was calculated on the gas and mileage charges in error, and confirmed that she would amend the calculations in that respect.

Remaining at issue is whether the Director erred in determining that compensation in lieu of notice was owed to Rheault. Avonlea also contends that the interest calculation is in error.

FACTS

Rheault was employed by Avonlea from January 1998 to June 22, 1998. Towards the end of the employment period, Avonlea found itself in financial difficulties. On June 22, Avonlea gave Rheault two weeks notice of termination. At that time, Rheault had experienced difficulty in clearing Avonlea's wage cheques, and was owed part of her pay from the period ending May 31,

as well as all of her wages for June to that date. Rheault sought other employment, since she felt she would not be paid for the work she would do in those two weeks.

The Director's delegate determined that Rheault's employment had been terminated pursuant to Section 66 of the Act on the basis that Avonlea had substantially altered a condition of employment, and found that Rheault was owed one week's compensation for length of service. .

ARGUMENT

Avon contended that although the business was in financial difficulty, Rheault was told she would be paid for the two week notice period. Avon argues that Rheault chose to look for other employment rather than work the two week period, and that Avonlea ought not be held responsible for compensation for that period.

Rheault contends that at the time she was given her notice, she asked Avon whether she would be paid for the last two weeks of work. Her evidence is that Avon was unable to answer her, and that she was never told when she would be paid, if ever. Rheault says that she elected to seek other employment at that point, since she needed employment income.

The Director's delegate argues that Rheault was terminated when she was told that she might not get paid for the work performed during the notice period, since that constituted a substantial adverse change in her employment condition, (ie a reduction in wage rate).

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

At issue is whether the Director may determine that there is a material change in an employee's working conditions when an employer is unable to meet wage obligations. By operation of Section 66, the material change constitutes termination.

Section 66 provides as follows:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

"Conditions of employment" is defined in Section 1 as "all matters and circumstances that in any way affect the employment relationship of employers and employees"

The test to ascertain whether a substantial change has occurred is an objective one (see Task Force Building Services Inc. v. British Columbia, (Director of Employment Standards) [1998] BC EST #D047/98) In determining whether a condition of employment has been substantially

altered, the director will have regard to the nature of the employment relationship, and may consider factors such as a change of working location, hours of work, a reduction of wages or a change in responsibilities.

The evidence is that Rheault had experienced difficulty in clearing Avonlea's wage cheques. At the time she was given notice, Rheault had not been paid for the previous three weeks of work. Avon testified that Rheault was told she would be paid, but could not recall whether she gave Rheault any indication of when payment might be expected, either in days or months. Rheault testified that she was never told that she could expect to be paid. I am not persuaded that Rheault was told that she would be paid for work performed at the time her employment was terminated. In fact, Rheault has yet to receive any money.

An employer has an obligation to comply with the Act. One of the obligations set out in the Act is to pay all wages earned in a pay period (Section 17). I am unable to conclude that the Director's delegate erred in concluding that a condition of employment has been substantially altered where an employer has repeatedly failed to meet that obligation.

I dismiss the appeal.

ORDER

I order, pursuant to Section 115 of the Act, that the Determination, dated February 16, 1999 be confirmed, subject to the delegate's recalculations as noted above, along with any interest accruing since the date of the Determination.

C. L. Roberts
Adjudicator
Employment Standards Tribunal